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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

TIM TOTH,

Plaintiff,

v.

CAVALRY PORTFOLIO SERVICES, LLC

Defendant.

CASE NO. 2:13-cv-01397

**DEFENDANT CAVALRY PORTFOLIO  
SERVICES, LLC'S MOTION TO  
DISMISS PLAINTIFF'S COMPLAINT  
PURSUANT TO FRCP 12(b)(6)**

Defendant Cavalry Portfolio Services, LLC ("Cavalry"), erroneously sued as Cavalry Portfolio Services, by and through its attorneys of record, Lipson, Neilson, Cole, Seltzer & Garin, P.C. and Simmonds & Narita LLP, hereby submits this Motion to Dismiss under FRCP 12(b)(6) for failure to state a claim upon which relief can be granted.

This motion is made on the grounds that the Complaint fails to state facts sufficient to constitute a cause of action against Cavalry under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq.* Cavalry requests that the Court grant this Motion and enter an order dismissing Plaintiff's Complaint ("Complaint") with prejudice.

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1 This Motion is based upon the attached Memorandum of Points and Authorities, the  
2 pleadings and papers on file herein, and such other evidence and argument as may be  
3 presented at the hearing on this matter.

4 Dated this 20th day of September, 2013.

5 LIPSON, NEILSON, COLE, SELTZER & GARIN, P.C.

6  
7 /s/ Jessica A. Green

8 By

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12 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF**  
13 **DEFENDANT CAVALRY PORTFOLIO SERVICES'S MOTION TO DISMISS PLAINTIFF'S**  
14 **COMPLAINT PURSUANT TO FRCP 12(b)(6)**

15 **I. Introduction**

16 Plaintiff Tim Toth ("Toth") has sued Defendant Cavalry Portfolio Services, LLC  
17 ("Cavalry") for alleged "repeated violations" of the Fair Debt Collection Practices Act, 15  
18 U.S.C. § 1692, *et seq.* ("FDCPA"). See Complaint (Doc. No. 1), ¶ 1. Toth's claims are  
19 completely lacking in merit, and his Complaint must be dismissed because it fails to state a  
20 claim upon which relief can be granted.

21 Toth's FDCPA claims are based on two factual allegations: (1) that Cavalry reported  
22 his alleged debt to the credit reporting agencies ("CRAs"); and (2) that Cavalry failed to provide  
23 him "notice as required by 15 U.S.C. § 1692g." See *id.* at ¶¶ 12-13.<sup>1</sup>

24 If the Court accepts Toth's allegations as true, as it must, then the section 1692g claim  
25 fails as a matter of law. Toth has not alleged that Cavalry ever had an "initial communication"

26  
27 <sup>1</sup> He also claims that Cavalry violated section 1692e by engaging in false, deceptive or  
28 misleading behavior; violated section 1692e(2) by misrepresenting the amount Toth owed; and  
violated section 1692e(8) by communicating false credit information. Yet Toth's Complaint does not  
include any factual contentions that support these claims. See *id.* at ¶¶ 22-25.

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1 with him, which is a prerequisite to Cavalry's obligation to send him the section 1692g notice.  
 2 The rest of the Complaint sets forth nothing more than a recitation of the language of various  
 3 sections of the FDCPA, unsupported by any concrete factual allegations. Given this, the  
 4 Complaint should be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil  
 5 Procedure. Unless Toth can explain how he can plausibly amend the Complaint to state a  
 6 valid claim, the Complaint should be dismissed with prejudice and without leave to amend.

## 7 **II. Allegations of The Complaint**

8 Toth filed his Complaint on August 6, 2013. See Complaint (Doc. No. 1). Toth alleges  
 9 that Cavalry "began reporting an allegedly past-due account with the credit reporting bureaus"  
 10 and that "[a]t no point did [Cavalry] provide [Toth] with a notice as required by 15 U.S.C. §  
 11 1692g." See *Id.* at ¶¶ 12-13.

12 By allegedly reporting information about his past-due account and failing to provide him  
 13 notice, Toth contends that Cavalry violated several sections of the FDCPA, specifically  
 14 sections 1692e, 1692e(2), 1692e(8), and 1692g(a). See *Id.* at ¶¶ 22-25.<sup>2</sup>

## 15 **III. Standard of Review Under FRCP 12(b)(6) Motion to Dismiss for Failure to State a Claim**

16  
 17 Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a complaint may be  
 18 dismissed if it fails "to state a claim upon which relief can be granted." Fed. R. Civ. P.  
 19 12(b)(6). The Federal Rules of Civil Procedure provide little guidance on what a plaintiff must  
 20 do to "state a claim" for relief, other than Rule 8, which says that a complaint must set forth  
 21 a "short and plain statement of the claim showing that the pleader is entitled to relief." *Id.*

22 The Supreme Court decisions in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)  
 23 ("*Twombly*"), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) ("*Iqbal*") represent a significant shift  
 24 in the analytical framework that courts must use when evaluating motions to dismiss. In  
 25 *Twombly*, the Court expressly rejected the "no set of facts" test that had been articulated in

26  
 27 <sup>2</sup> Although it is unclear as to how it is related to his claims, Toth alleges that he "contemplated  
 28 filing bankruptcy as a result of [Cavalry's] illegal conduct to stop harassing calls in the future." See *Id.*  
 at ¶ 16. Given that Toth does not allege that Cavalry ever called him, this allegation appears to be a  
 cut and paste error that is unrelated to this action.

1 *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). See *Twombly*, 550 U.S. at 562-63. The Court  
2 clarified that although "detailed factual allegations" are not required at the pleading stage,  
3 "labels and conclusions, and a formulaic recitation of the elements of a cause of action will not  
4 do." *Id.* at 555. The complaint must contain factual allegations, and they "must be enough  
5 to raise a right to relief above the speculative level." *Id.* There must be sufficient facts pled  
6 to state a claim to relief that is "plausible on its face." *Id.* at 570.

7 The Supreme Court refined its analysis even further in *Iqbal*, reiterating that Rule 8  
8 requires "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*,  
9 556 U.S. at 678. Only a complaint that states "a plausible claim for relief" can survive a motion  
10 to dismiss. *Id.* at 679. "A claim has facial plausability when the plaintiff pleads factual content  
11 that allows the court to draw the reasonable inference that the defendant is liable for the  
12 misconduct alleged. . . The plausability standard is not akin to a 'probability requirement,' but  
13 it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* at 678. A  
14 complaint that contains facts which are "merely consistent with" defendant's liability is not  
15 sufficient, because it "stops short of the line between possibility and the plausibility of  
16 entitlement to relief." *Id.* (citations and quotation marks omitted).

17 The Court should not assume the truth of legal conclusions in the Complaint. *Id.* Thus,  
18 the first step when evaluating a motion to dismiss is to identify the legal conclusions, because  
19 they "are not entitled to the assumption of truth. While legal conclusions can provide the  
20 framework for a complaint, they must be supported by factual allegations." *Id.* at 679. Next,  
21 with respect to any "well-pleaded factual allegations" in the Complaint "a court should assume  
22 their veracity and then determine whether they plausibly give rise to an entitlement to relief."  
23 *Id.* The determination of whether a plausible claim for relief has been stated is "a  
24 context-specific task" that requires a court to "draw on its judicial experience and common  
25 sense." *Id.*

26 Dismissal is therefore proper under Rule 12(b)(6) where a court finds either: 1) the lack  
27 of a cognizable legal theory; or 2) the absence of sufficient facts alleged under a cognizable  
28 legal theory. See *Johnson v. Riverside Healthcare Sys., L.P.*, 534 F.3d 1116, 1121 (9th Cir.

2008). As the Ninth Circuit has observed: "In sum, for a complaint to survive a motion to dismiss, the non-conclusory factual content, and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. United States Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (internal quotation marks omitted).

Toth has not pled facts sufficient to support a plausible claim for relief against Cavalry under the FDCPA, consistent with the pleading requirements of Rule 8 and the decisions in *Iqbal* and *Twombly*. The Complaint must be dismissed.

#### IV. Argument

##### A. **Toth Has Failed To Plead Facts Sufficient To State A Claim Under The FDCPA.**

In his Complaint, Toth states that Cavalry committed "repeated violations" of the FRCA. See Complaint (Doc. No. 1), ¶ 1. Although Toth has identified various sections of the FDCPA he claims Cavalry violated, his Complaint fails to set forth any facts that might satisfy the elements of those claims.

Toth merely alleges that Cavalry violated section 1692e "in that [Cavalry] engaged in false, deceptive or misleading behavior in connection with the collection of a debt;" section 1692e(2) "in that [Cavalry] misrepresented the amount of the Debt owed by Plaintiff and attempted to have Plaintiff pay more than the Debt owed to Creditor;" section 1692e(8) "in that [Cavalry] communicated or threatened to communicate false credit information, including the failure to communicate that the Debt was 'disputed,' in an attempt to collect a debt;" and section 1692g "in that [Cavalry] failed to send a notice, as required by [section 1692g(a)], to Plaintiff within five days of the report being made to the credit bureas [sic]." See *Id.* at ¶ 22-25. These conclusory statements, through which Toth simply parrots the language of the FDCPA, are insufficient to allege a cognizable claim under the FDCPA.

Section 1692e prohibits debt collectors from using "any false, deceptive, or misleading representation or means in connection with the collection of any debt." See 15 U.S.C. § 1692e. Section 1692e(2) prohibits debt collectors from misrepresenting "the character, amount, or legal status of any debt." See *Id.* at § 1692e(2). Section 1692e(10) prohibits debt collectors

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1 from “communicating or threatening to communicate to any person credit information which  
 2 is known or which should be known to be false, including the failure to communicate that a  
 3 disputed debt is disputed.” See *Id.* at § 1692e(10). Toth has not described any efforts that  
 4 Cavalry allegedly took to try to collect a debt from him that were false, deceptive, or  
 5 misleading, let alone any actions where Cavalry misrepresented the character, amount, or  
 6 legal status of any debt or where Cavalry communicated any false information regarding the  
 7 debt.<sup>3</sup> The allegations of his Complaint are wholly insufficient. See, e.g., *Myers v. Stoneleigh*  
 8 *Recovery Assocs.*, 2012 WL 1356752, \*\*4-5 (E.D. Cal. Apr. 18, 2012) (granting motion to  
 9 dismiss claims under §§ 1692d, 1692e(5), and 1692f where plaintiff merely recited elements  
 10 of statutes and did not allege any facts in support of claims).

11 Toth’s allegations demonstrate that he does not have a valid claim under section 1692g  
 12 of the FDCPA. Section 1692g(a) mandates that a collector must provide the consumer with  
 13 a written notice setting forth the consumer’s right to dispute the debt “[w]ithin five days after  
 14 its **initial communication with a consumer** in connection with the collection of any debt,” or  
 15 “in the initial communication” itself. See 15 U.S.C. § 1692g(a) (emphasis added).<sup>4</sup> The plain  
 16 language of section 1692g provides that a collector need not send the notice until five days  
 17 after the collector has actually had the first “communication” directly “with a consumer”  
 18 concerning the debt. The Act is crystal clear on this point: it does not say the notice must be  
 19 provided within five days of any “attempted” communication with the consumer, nor does it say

20 \_\_\_\_\_  
 21 <sup>3</sup> The only conduct Toth complains of is Cavalry’s alleged reporting of information to the CRAs  
 22 and its alleged failure to provide him notice. As explained below, a debt collector may report  
 23 information to the CRAs, and Cavalry’s reporting is not considered an “initial communication” with the  
 24 consumer that triggers the notice requirements under section 1692g.

25 <sup>4</sup> The notice must convey, *inter alia*, the following:

- 26 (3) a statement that unless the consumer, within thirty days after receipt of the notice,  
 27 disputes the validity of the debt, or any portion thereof, the debt will be assumed to be  
 28 valid by the debt collector;
- (4) a statement that if the consumer notifies the debt collector in writing within the thirty-day  
 period that the debt, or any portion thereof, is disputed, the debt collector will obtain  
 verification of the debt or a copy of a judgment against the consumer and a copy of  
 such verification or judgment will be mailed to the consumer by the debt collector.

15 U.S.C. § 1692g(a)(3, 4).



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1 the notice must be given within five days of a communication with a third party. Courts have  
 2 recognized that the section 1692g requirements are not trigger until the collector actually  
 3 communicates "with a consumer." See, e.g., *Edeh v. Aargon Collection Agency, LLC*, 2011  
 4 WL 2963855, \*4 (D. Minn. June 20, 2011) *report and recommendation adopted*, 2011 WL  
 5 2910750 (D. Minn. July 20, 2011) ("The definition of 'consumer' does not include credit  
 6 reporting agencies, which are business entities rather than 'natural person[s].'"")

7 Toth does not claim that Cavalry ever communicated with him. Rather, he claims that  
 8 Cavalry "failed to send a notice, as required by [section 1692g(a)], to Plaintiff within five days  
 9 of the report being made to the credit bureas [sic]." See Complaint (Doc No 1) at ¶ 25. Thus,  
 10 he seeks to impose requirements on Cavalry that do not exist. Numerous courts have  
 11 recognized that communications with consumer reporting agencies or other third parties do  
 12 not trigger an obligation to send the section 1692g notice to the consumer. See, e.g.,  
 13 *Robinson v. TSYS Total Debt Managment, Inc.*, 447 F. Supp. 2d 502, 508-09 (D. Maryland  
 14 2006) (summary judgment for defendant on § 1692g claim: allegation that Defendant  
 15 "communicated the debt to Plaintiff's credit report," thus triggering obligation to send § 1692g  
 16 notice, does not support § 1692g claim "because it is not a communication with a consumer");  
 17 *Horvath v. Premium Collection Servs., Inc.*, 2010 WL 1945717, \*4 (D. Ariz. May 13, 2010)  
 18 (unpublished) (dismissing claim under section 1692g; first amended complaint failed to allege  
 19 debt collector ever communicated with plaintiff); *Pretlow v. AFNI, Inc.*, 2008 WL 345593, \*1  
 20 (W.D. Va. Feb. 7, 2008) (dismissing § 1692g claim where plaintiff only alleged  
 21 communications between defendant and consumer reporting agencies); *Kaiser v. Braje &*  
 22 *Nelson, LLP*, 2006 WL 1285143, \*4 (N.D. Ind. May 5, 2006) (granting summary judgment on  
 23 § 1692g claim where all communications were with debtor's attorney, not with debtor).

24 The notice requirements under § 1692g were never triggered, so Toth's section 1692g  
 25 claim fails as a matter of law. See *Edeh*, 2011 WL 2963855 at \*4 ("Thus, the [CRAs] are not  
 26 "consumers" under the FDCPA, and [defendant's] reporting of the debt to these agencies did  
 27 not trigger any notification obligations under § 1692g(a)."). None of the other conclusory  
 28 allegations in the Complaint support a valid claim.

1 **V. Conclusion**

2 For the foregoing reasons, Cavalry respectfully requests that the Court issue an Order  
3 dismissing the Complaint, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.  
4 Unless Toth demonstrates in advance that he can amend his Complaint to state a valid claim,  
5 the Complaint should be dismissed with prejudice.

6 Dated this 20th day of September, 2013.

7 LIPSON, NEILSON, COLE, SELTZER & GARIN, P.C.

8 /s/ Jessica A. Green

9 By

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 20<sup>th</sup> day of September, 2013, service of the foregoing  
**DEFENDANT CAVALRY PORTFOLIO SERVICES, LLC'S MOTION TO DISMISS**  
**PLAINTIFF'S COMPLAINT PURSUANT TO FRCP 12(b)(6)** was made upon each party in the  
case who is registered as an electronic case filing user with the Clerk, pursuant to Fed. Rule  
Civ.P.5(b)(3), and Local Rule 5-4, as follows:

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